No. 91-543

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK,

Petitioner,

against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and WILLIAM P. BARR, as Acting United States Attorney General,

Defendants,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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September 27, 1991

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1991
(1379—LC4-527)

Question Presented

Whether Congress, consistent with the limits imposed by the Constitution and especially the Tenth Amendment, may directly compel a State to "be responsible for" and develop a plan for the disposal of low-level radioactive waste produced by private, state, and some federal generators within the State's borders, and may require the State to take title to, assume possession of, and be legally liable for such waste if it fails to develop and implement such a plan.

Parties

The parties to the proceeding below were:

1. The State of New York, Plaintiff;

2. The County of Allegany, New York, Plaintiff;

3. The County of Cortland, New York, Plaintiff;

4. The United States of America, Defendant;

5. James D. Watkins, as Secretary of Energy, Defendant;

6. Kenneth M. Carr, as Chairman of the United States Nuclear Regulatory Commission, Defendant;

7. Samuel K. Skinner, as Secretary of Transportation, Defendant;

8. William P. Barr, as Acting United States Attorney General, Defendant;[1]

9. The State of Washington, Intervenor;

10. The State of Nevada, Intervenor;

11. The State of South Carolina, Intervenor.

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[1]In the proceedings below, Richard Thornburgh was named as a defendant in his capacity as United States Attorney General. Mr. Barr, who is currently Acting United States Attorney General, has been substituted pursuant to Supreme Court Rule 35.3.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

THE STATE OF NEW YORK,

Petitioner,

against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and WILLIAM P. BARR, as Acting United States Attorney General,

Defendants,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioner State of New York respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on August 8, 1991 (Nos. 91-6031, 91-6033 and 91-6035).

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at ____ F2d ____ (2d Cir August 8, 1991) (Westlaw 1991 WL 150660), and is reprinted in the appendix hereto, p. 1a, *infra*.

The opinion of the District Court is reported at 757 F Supp 10 (NDNY 1990), and is reprinted in the appendix hereto, p. 18a, *infra*.

Jurisdiction

Invoking federal jurisdiction under 28 USC §§ 1331, 1337, 1346, 2201, and 2202, petitioner and other plaintiffs brought this suit in the Northern District of New York. On December 7, 1990, the Northern District granted defendants' motion to dismiss the complaint. See p. 18a, *infra*.

On plaintiffs' appeals, the Second Circuit on August 8, 1991 entered a judgment and opinion affirming the District Court's order. See p. 1a, *infra*.

This Court's jurisdiction is invoked under 28 USC § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

42 USC § 2021c(a)(1):

> Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of—
>
> (A) low-level radioactive waste generated within the State (other than by the the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983;
>
> (B) low-level radioactive waste described in subparagraph (A) that is generated by the Federal Government except such waste that is—
>
> (i) owned or generated by the Department of Energy;
>
> (ii) owned or generated by the United States Navy as a result of the decommissioning of vessels of the United States Navy; or
>
> (iii) owned or generated as a result of any research, development, testing, or production of any atomic weapon * * * *

42 USC § 2021e (d) (2) (C):

* * *

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

Statement of the Case

In an effort to provide for the secure disposal of low-level radioactive waste materials generated throughout the United States, Congress enacted the Low Level Radioactive Waste Policy Act (Pub. L. 96-573) in 1980.[2] That legislation set forth a federal policy that each State, in its capacity as state sovereign, was responsible for providing for the disposal of low-level radioactive waste generated within its borders by private, state, and certain federal producers; empowered States to form interstate compacts to meet these duties; and enabled compact States to bar use of compact facilities for the disposal of waste generated outside the compact region after January 1, 1986. P.L. 96-573, §§ 4(a)(1), 4(a)(2)(B).

[2]Low-level radioactive waste was defined in the 1980 Act as "radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954." P.L. 96-573, § 2(2).

While a majority of states joined or proposed to join compacts in the years following the passage of the 1980 Act, no new state or regional disposal facilities were projected to become operational until the early 1990s. Consequently, the exclusion provision of the 1980 Act posed a problem: congressional ratification of proposed compacts whose members operated existing disposal sites (Washington, Nevada, and South Carolina) might have denied access to disposal sites to all states who were not in those compacts. Accordingly, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USC §§ 2021b-2021i) to permit ratification of proposed compacts while granting all states continued limited access to existing disposal sites.

The 1985 Act assigned to the States in their sovereign capacity mandatory responsibility for the disposal of low-level radioactive waste.[3] It further provided that conditional access to disposal sites in Washington, Nevada, and South Carolina would be granted to all states between January 1, 1986 and December 31, 1992, and set forth a detailed transition scheme, with incentives and penalties, to

[3]The 1985 Act defines low-level radioactive waste (LLRW) as radioactive material that: (a) is not "high-level" radioactive waste, spent nuclear fuel, or by-product material as defined at 42 USC § 2014(e)(2); and (b) is classified as LLRW by the Nuclear Regulatory Commission. Nationwide, about 90% of the volume and 97% of radioactivity of LLRW for which the 1985 Act assigns disposal responsibility to the states comes from nuclear power plants and other industrial sources; the remainder is generated by research laboratories, hospitals, and medical centers.

The Act requires the States to be responsible for disposal of Class A waste (containing radioactivity which will diminish to a safe exposure level within 100 years), Class B waste, and Class C waste (requiring protection against exposure for 500 years). Class C waste comprises less than 1% of volume and emits over 65% of the radiation of all LLRW.

encourage compact formation and disposal site development. 42 USC § 2021e.[4]

A novel affirmative directive of the 1985 Act was contained in 42 USC § 2021e(d)(2)(C):

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

With this provision, Congress decisively altered the method and impact of prior legislation regulating low-level radioactive waste disposal through encouragement and voluntary incentives. The new Act abruptly coupled "responsibility" for such waste with a free-standing mandate that each State develop a program for the disposal of waste generated within its borders by private and other generators, including some federal generators. It strengthened this

[4]By specific dates within that period, States and compacts were directed to comply with a number of regulatory requirements, including: ratification of compact legislation or indication of the State's intent to site a LLRW disposal facility in state, development of a siting plan, and license application (2021e[e] [1]). Failure to meet this schedule might result in added surcharges upon waste generators by disposal site operators, denial of access to the Washington, Nevada, and South Carolina sites, and loss of certain surcharge rebates to the States (2021e[d], [e]).

mandate through the command that States assume ownership and possession of, as well as legal liability for, such waste if they fail to comply with the federal scheme and timetable of regulation.

New York State's congressional delegation participated in the drafting and enactment of both the 1980 and the 1985 Acts.

In February, 1990, the State of New York and the Counties of Allegany and Cortland, New York, commenced an action in the United States District Court for the Northern District of New York against various federal defendants, seeking a declaration that, among other constitutional flaws, the 1985 Act violated the Tenth Amendment through the imposition of these broad new affirmative duties upon the States. The States of Washington, Nevada, and South Carolina subsequently joined the action as intervenors in support of defendants.

The District Court (Cholakis, J.) granted defendants' motion for summary judgment and dismissal of the complaint in a bench decision issued in December, 1990. Addressing the Tenth Amendment claim, the court declared that in light of this Court's holding in *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985), that "judicial review of Congressional enactments founded on Commerce Clause powers should be limited primarily to inquiry of whether the political process has failed," Tenth Amendment review was proper only to discern "problems which may have had an untoward effect on a particular law's enactment or its subsequent political review" (22a, 25a). Finding that the 1985 Act imposed no restriction on New York's "ability to operate in the political arena and to challenge the law," the court found judicial review unwarranted on grounds of a failure of the political process.

While recognizing that *Garcia* left open the possibility of judicial review of the substantive impact of federal action under the Commerce Clause in exceptional cases, the court ruled that such exceptions arose only "when constitutional equality amongst the states has been jeopardized" by the federal act (23a). Finding no such jeopardy, nor other grounds for constitutional attack, in the 1985 Act, the court dismissed the State's and counties' complaint (26a).

On appeal, the Court of Appeals for the Second Circuit affirmed. In its decision, the court observed that, in light of Congress's traditional role in nuclear regulation, "appellants undertake an unusually burdensome task" in challenging the 1985 Act (10a). The court held that "both the 1980 Act and its 1985 Amendments are paragons of legislative success" (13a), and rejected any claim that the Act or its take title provision was the product of a failure in the political process.

The court found unpersuasive appellants' argument that *Garcia* permitted review of congressional mandates, such as the take title provision, which significantly limited the States' role in the federal system and thereby altered the federal constitutional structure. While it neither confirmed nor denied that such review is permissible, it endorsed the district court's holding that such review, if permissible, could consider only whether the federal act upset the "equality in dignity and power" among the several States (15a; citing *Coyle v Smith*, 221 US 559 [1911]). "In sum," the court noted (16a),

> we are satisfied that the take title provision does not undermine the constitutional structure. Neither does it violate principles of federalism as recently explained in *Garcia;* and '[w]here, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated.' [*South Carolina v] Baker*, 485 U.S. [505 (1988)] at 513 (emphasis in original).

The court also dismissed challenges to the Act based upon the Eleventh Amendment and the Guaranty Clause (16a-17a), and affirmed the grant of summary judgment to defendants.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision improperly narrows the scope of Tenth Amendment challenges under *Garcia*.

In its decision in *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985), this Court determined that the primary protection of state sovereign interests in the federal system lay with the federal political process and that Tenth Amendment challenges to federal statutes must generally allege a failure of that process. 469 US at 550, 554. This Court expressly recognized, however, that additional Tenth Amendment protection might be available to the States in cases where federal action, though not the product of a defective political process, was more intrusive than that reviewed in *Garcia* or its antecedents, stating (469 US at 556):

> These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. See *Coyle v. Oklahoma*, 221 U.S. 559 (1911).

We believe that the present case requires substantive consideration of the Tenth Amendment challenge even under the limited criteria of *Garcia*.

The contours of the constitutional structure referred to in *Garcia*, and the importance of the limits which it imposes, were recently set forth by this Court in *Gregory v. Ashcroft*, 111 S Ct 2395 (1991). Noting that the Constitution created a federal government of limited powers, including limitations under the Tenth Amendment, the Court observed (111 S Ct at 2399-2400):

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . .
>
> Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . .
>
> . . . In the tension between federal and state power lies the promise of liberty.

The courts below failed to recognize that the 1985 Act, and especially its take title provision, exceeds the limits imposed on federal action by the Tenth Amendment by seriously undermining the basic federal structure and sets a dangerous precedent for abuse of Congress's coordinate power in the federal system.

The 1985 Act differs fundamentally from all federal action previously reviewed by this Court under the Tenth Amendment. While it is not the first congressional act which seeks to have the States exercise their sovereign powers for federal purposes, it is the first to impose upon each State an affirmative duty to exercise sovereign powers of legislation and regulation within the State, in accordance with a federal regulatory scheme, without the State's consent, and with no option for the State's withdrawal from the role of regulator or actor in the field. The imposition is threefold: the broad assignment to the States of "responsibility" for a federal regulatory concern; the establishment of parameters and a timetable for compliance with that assignment of regulation; and the attachment of draconian, affirmative obligations on the States for a refusal or failure to meet that regulatory responsibility or timetable.

Most insidiously, under the 1985 Act, after January 1, 1996, States which do not provide for disposal of low level radioactive waste generated within their borders are made responsible by the Federal government for all such waste generated by private producers and some federal producers throughout the State. In a manner to our knowledge unprecedented, the take title provision transfers by congressional edict the ownership obligations of federal and private parties to the State. States are compelled by this provision to exercise their sovereign powers as agents of federal regulation, not as a consequence of reflection and decision by state legislative and executive branches, but by fiat of the Federal government. These duties and obligations are not imposed upon the State in its capacity as a generator of low-level waste like any other economic actor, or even in its capacity as an agreement state and past regulator of

such waste.[5] Rather, it is imposed solely in light of the State's sovereign capacity.

The 1985 Act, therefore, differs substantially from the amendments to the Fair Labor Standards Act reviewed in *Garcia,* which merely extended to state and local governments the regulations which imposed overtime, recordkeeping, and other obligations upon employers throughout the nation. These "generally applicable federal regulations" *(South Carolina v Baker,* 485 US 505, 515 [1988]) did not include requirements that States initiate or continue an employment program, or perform a unique role as regulator of hiring practices within their borders.

While Congress has in the past used the Commerce Clause as a basis for strongly encouraging state sovereign participation in federal regulatory schemes, such schemes have generally provided for voluntary state action in lieu of federal regulation (e.g., Clean Air Act, 42 USC §§ 7401 [a][3]; 7407[a]; Clean Water Act, 33 USC § 1251[b]), or have made voluntary receipt of federal funds contingent upon compliance (e.g., 23 USC § 154 [regulation of travel speed on public highways]). In cases where Congress directs that federal funding be contingent upon state participation in a federal regulatory scheme, States are left with

[5] Under federal guidance, New York State has been active in the regulation of such materials within its borders for close to three decades as an agreement state in accordance with 42 USC § 2021(b). In addition, the New York State Power Authority currently operates two nuclear power plants within the State, and waste materials are produced at various state hospitals and research facilities. Moreover, with federal encouragement the State voluntarily participated in an experimental program for nuclear waste management at West Valley, New York between 1963 and 1975; ultimately the program was terminated because of health and safety concerns. However, at no time prior to the 1980 and 1985 Acts was the State's role as a producer or regulator of low-level waste an obligatory burden imposed by the federal government. In each case, the role was determined by the State Legislature and Executive, in the exercise of their sovereign authority.

the choice of whether the state interests advanced by such funding outweighed the burden upon the state governmental structure in fulfilling the federal regulatory functions imposed upon it. A similar choice is available to state sovereigns in cases where a federal regulatory scheme offers States the opportunity to participate in lieu of federal regulators. In all such cases, although the choice may be difficult, and the realistic probability that the State will elect not to participate in the federal regulatory scheme may be small, the choice exists nonetheless.

We submit that this opportunity for the State to act through its legislature in determining whether to participate in a federal program is an essential aspect of the structure of the federal system. Without it, that structure is severely compromised. Absent the opportunity to abstain from federal regulatory schemes which invoke the States' sovereign powers, state governments are forced to become unwilling subordinate agents to congressional dictates. Absent the opportunity to make such decisions, they are sharply constrained in their ability, noted in *Garcia* and repeated in *Ashcroft,* to serve as laboratories for social and economic experiment, or "to engage in any activity that their citizens choose for the common weal." 469 US at 546. Without such options, not only may States be compelled to participate in federal regulatory schemes by inescapable congressional fiat, but they may also be obliged to assume responsibility for the full financial and administrative burden of such schemes.

Under the 1985 Act, States are required either to adopt a program regulating the disposal of non-state generated low-level radioactive waste in accordance with federal requirements or else to assume complete ownership responsibility for such wastes, including the liability that would

otherwise rest with the non-state generators under state law. In either case, the 1985 Act directly compels the State to take extensive sovereign action to manage private and federal low-level radioactive waste. This is, we submit, an unprecedented and unconstitutional exercise of federal power.

It is indisputable in this case that the 1985 Act treated a matter of serious national concern, was imposed by a well-intentioned Congress, and addressed a regulatory field where some States have voluntarily participated in the past. Indeed, New York State has sought for three decades to encourage the responsible development of nuclear power within its borders and has pioneered experiments in nuclear waste management technology. Throughout this period, however, each of the State's efforts as a generator and regulator of nuclear material was undertaken after careful reflection and decision by its legislative and executive branches, substituting for or augmenting an underlying scheme of federal regulation. In contrast, under the 1985 Act, States are denied the power to decide in broad terms whether and how their legislative and regulatory powers will be used. Though they are left with some flexibility in choosing the details of compliance with federal demands—e.g., whether or not to join a compact; how such a compact might be organized; whether or not the compact should exclude waste from non-member states, etc.—the terms of the take title provision bar States from reaching and implementing legislative decisions to decline or cease to exercise local sovereign power in the regulatory field.

The Act imposes an unprecedented substantive burden upon state members of the federal system. Its enactment evidences a truth expressly recognized by this Court in *Garcia:* the process of federal lawmaking, however informed and expeditious, does not guarantee that Con-

gress cannot err, and through such error, cause harm to the structure of the federal system.

To our knowledge, this Court has never before reviewed a regulatory scheme of this type in light of the Tenth Amendment. Prior to *Garcia,* however, this Court indicated its concern over efforts by the federal government to "use state regulatory machinery to advance federal goals." *Federal Energy Regulatory Commission (FERC) v Mississippi,* 456 US 742, 759 (1982). Upholding against Tenth Amendment challenge in *FERC* various sections of the federal Public Utility Regulatory Policies Act of 1978 (PURPA)—including a requirement that States hold public hearings and consider implementation of certain federal regulatory standards—this Court emphasized that PURPA required mere consideration, rather than outright adoption of the federal scheme (456 US at 765-66):

> While the condition here is affirmative in nature—that is, it directs the States to entertain proposals—nothing in this Court's cases suggests that the nature of the condition makes it a constitutionally improper one. There is nothing in PURPA "directly compelling" the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' "separate and independent existence" [citations omitted], and do not impair the ability of the States "to function effectively in a federal system." [citations omitted.]

Similar concerns were expressed in *Hodel v Virginia Surface Mining & Recl. Assn.,* 452 US 264 (1981), in which this Court reviewed the Surface Mining Control and Reclamation Act of 1977, which empowered the Department of the Interior to promulgate and enforce guidelines for the

nationwide regulation of surface coal mining. Under that Act, States were afforded the opportunity to operate their own regulatory programs so long as such programs complied with federal regulatory standards. 452 US at 268-72. In upholding the Act's provisions against Tenth Amendment challenge, this Court distinguished the establishment of federal minimum regulatory standards upon private activity in the States from the imposition of affirmative and unavoidable regulatory obligations upon state governments (452 US at 288):

> [T]he States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

This Court's opinions in both *Hodel* and *FERC*, therefore, suggest that congressional imposition of a federal regulatory scheme through unwilling state action was, standing alone, constitutionally suspect under the Tenth Amendment. That view was also expressed in opinions by three Courts of Appeals more than a decade ago.[6] While this

[6]*See, e.g., Maryland v EPA*, 530 F2d 215 (4th Cir 1975), *vacated and remanded for consideration of mootness sub nom. EPA v Brown*, 431 US 99 (1977) (*per curiam*) (EPA regulations compelling states to establish and fund automobile inspection programs, under penalty of criminal and civil sanctions upon non-complying states, violate Tenth Amendment); *Brown v EPA*, 521 F2d 827 (9th Cir 1975), *vacated and remanded for consideration of mootness*, 431 US 99 (1977) (*per curiam*) (same); *District of Columbia v Train*, 521 F2d 971 (D.C. Cir 1975), (Footnote continued on next page.)

Court in *South Carolina v Baker*, 485 US 505 (1988), left open the possibility that the teachings of *FERC* on this issue might to some degree have been subsumed by *Garcia* (485 US at 513), this Court did not address the issue as such because it was unnecessary to do so.[7]

In short, we believe that the courts below erred in their conclusion that this Court's opinion in *Garcia* barred substantive review of the 1985 Act under the Tenth Amendment. While the courts below may be correct in their view that the 1985 Act does not upset the "equality in dignity

(Footnote continued.)

vacated and remanded for consideration of mootness sub nom. EPA v Brown, 431 US 99 (1977) (*per curiam*) (same). *Contra, Pennsylvania v EPA*, 500 F2d 246 (3d Cir 1974). After the Supreme Court had granted certiorari in three EPA cases in 1976, the EPA rescinded some of the regulations at issue and conceded that others were invalid unless modified. Thus, the Court vacated and remanded without ruling on their constitutionality. 431 US at 103-04.

[7]The federal act challenged in *Baker*—section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)—removed federal income tax exemptions for interest earned on new bonds issued by state and local governments unless the bonds were issued in registered form. Designed to provide a strong incentive to encourage governments to issue registered bonds, this portion of the Act merely provided that bondholders of States which did not comply with the federal regulatory scheme would forfeit the tax benefits previously extended to them by the federal government. As the Court noted in response to the claim that the effect of TEFRA was to commandeer South Carolina's legislative process (485 US at 514-15, emphasis added):

> Such "commandeering" is . . . an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That *a State wishing to engage in certain activity* must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Unlike the 1985 Act, TEFRA did not compel an exercise of state sovereign power, or the legislative enactment of a new regulatory program.

and power" among the several States, we believe that the Act exceeds any proper "affirmative limits the constitutional structure might impose upon federal action affecting the States under the Commerce Clause" (469 US at 556), and warrants review by this Court. We further believe that, should it find that *Garcia* bars review of this matter, this Court should consider whether, in light of the danger to the federal system inherent in this new style of congressional regulation, this Court's opinion in *Garcia* should be reconsidered.

CONCLUSION

This Court should grant a writ of certiorari.

Dated: Albany, New York
September 27, 1991

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals, Second Circuit, Dated August 8, 1991

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 1511, 1512, 1513 August Term, 1990

(Argued: May 21, 1991 Decided: Aug. 8, 1991)

Docket No. 91-6031, 91-6033 & 91-6035

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY, NEW YORK and THE COUNTY OF CORTLAND, NEW YORK,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and RICHARD THORNBURGH, as United States Attorney General,

Defendants-Appellees,

STATE OF WASHINGTON; STATE OF NEVADA; and STATE OF SOUTH CAROLINA,

Intervenors-Appellees,

AMERICAN COLLEGE OF NUCLEAR PHYSICIANS; ARIZONA PUBLIC SERVICE COMPANY; BALTIMORE GAS & ELEC-

TRIC COMPANY; CALIFORNIA RADIOACTIVE MATERIALS MANAGEMENT FORUM, INC.; COMMONWEALTH EDISON COMPANY; FLORIDA POWER & LIGHT COMPANY; GULF STATES UTILITIES COMPANY; MALLINKRODT MEDICAL, INC.; PACIFIC GAS & ELECTRIC CO.; PUBLIC SERVICE COMPANY OF COLORADO; SOCIETY OF NUCLEAR MEDICINE; SOUTHERN CALIFORNIA EDISON CO.,

Amici Curiae.

Before: MESKILL, PIERCE and MCLAUGHLIN, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge*), dismissing a civil complaint seeking declaratory judgment. 28 U.S.C. §§ 2201, 2202.

Held: Under *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b-2021j, does not violate state sovereignty protected under the Tenth Amendment and related principles of federalism.

AFFIRMED.

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McLaughlin, *Circuit Judge:*

Plaintiffs-appellants appeal from a judgment entered in the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge),* dismissing a civil complaint seeking declaratory relief. 28 U.S.C. §§ 2201, 2202. The district court found that the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b-2021j, was not an impermissible affront to state sovereign immunity protected under the Tenth Amendment, and that, absent unequal treatment accorded to the State of New York or a defect in the federal political process, Supreme Court precedent precludes further judicial review of the federal statute. The district court also found no Eleventh Amendment violation and dismissed plaintiffs' remaining challenges as meritless.

For the reasons set forth, we affirm.

BACKGROUND

More than thirty years ago, Congress sought to engage the states in a partnership venture that would recognize the interests of the several states in the peaceful uses of nuclear energy. Pub. L. No. 86-373, § 1, 73 Stat. 688, codified as amended 42 U.S.C. § 2021. *See English v. General Elec. Co.,* 110 S. Ct. 2270, 2276 (1990) ("In 1959, Congress amended the Atomic Energy Act in order to 'clarify the respective responsibilities . . . of the States and the [Federal Government]' . . . and generally to increase the States' role."). Under the Atomic Energy Act, the Atomic Energy Commission, predecessor to the Nuclear Regulatory Commission ("NRC" or "Commission"), was authorized to make agreements with the Governor of any state "providing for discontinuance of the regulatory authority of the Commission" with respect to enumerated nuclear materials and byproducts. 42 U.S.C. § 2021(b).

In 1959, an advisory committee formed at the behest of Governor Nelson A. Rockefeller recommended that New York execute an agreement with the Commission to have the State assume all regulatory control possible under federal law. It should be noted, too, that the advisory committee also recommended at that early date that the State establish a site to store radioactive waste, in part, "to encourage the growth of the atomic industry within the state." Even before the advisory committee's report was issued, the New York State Legislature passed the 1959 Atomic Energy Act, *see* 1959 N.Y. Laws Ch. 41, declaring it to be the State's policy to encourage "development and use of atomic energy for peaceful purposes." New York became a so-called "agreement state" under the federal scheme by 1962. 27 Fed. Reg. 10, 419 (1962).

A concern, universally acknowledged, that has accompanied the expansion of the nuclear industry is the storage

and disposal of low-level radioactive waste ("LLRW") such as contaminated waste from nuclear reactors, hospitals, research laboratories and pharmaceutical companies. During the 1970's, disturbing problems surrounding safe LLRW disposal reached mammoth proportions and commanded immediate congressional attention. As late as 1978 only three states—Washington, Nevada, and South Carolina—had established sites for LLRW operations; the rest of the country transported radioactive waste to these locations—with obvious risks.

The problem worsened dramatically when Washington and Nevada temporarily closed their sites because of improper handling, transportation and packaging of LLRW, shifting an already herculean task onto the lonely shoulders of South Carolina's Barnwell site. H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 2 at 17, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2974, 3006. Understandably vexed that sister states were not bearing a fair share of the disposal burden, Washington voters approved a 1980 initiative to ban in-state disposal of LLRW generated outside Washington State. While that initiative was struck as unconstitutional, *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982) (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978)), *cert. denied*, 461 U.S. 913 (1983), it demonstrated that the LLRW problem was fast becoming acute.

Congress turned its attention to these problems but, at the states' request, and in the interest of federalism, deferred action to allow the formulation of state-based and state-created proposals. 1985 U.S. Code Cong. & Admin. News at 3007. The National Governors' Association (NGA) spearheaded the effort with a Task Force to review and formulate a coordinated policy on the LLRW issue. Other state-based associations, including the National Conference of State Legislatures and the President's State Planning Council on Radioactive Waste Management, joined

the effort. *Id.* Because, in the eyes of the NGA, disposition of low-level waste was largely a state responsibility, the Task Force's first recommendation to Congress was that "each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders, except for waste generated at federal government facilities." Accordingly, the NGA invited Congress to enact legislation that would (1) authorize states to form interstate regional compacts; (2) eventually allow compact regions to exclude LLRW generated outside the region; and (3) provide for the safe interim storage of LLRW.

Congress complied by enacting the Low-Level Radioactive Waste Policy Act of 1980. 42 U.S.C. §§ 2021b-2021d (the "1980 Act"). Subject to congressional consent, states were authorized to form regional compacts and, after January 1, 1986, to refuse waste generated outside these established regions. Many states apparently progressed toward the establishment of regional compacts (or individual "go it alone" in-state disposal sites), but the original target date of January 1986 proved unrealistic. The three states that were accepting LLRW, disquieted with frustration, again looked to Congress. The NGA again stepped in to forge a state-based consensus and negotiated a seven-year extension, or "transition package" with the three sited states, buying more time for the regional solutions to become operable. 1985 U.S. Code Cong. & Admin. News at 3008.

Acting on this consensus, Congress adopted elaborate amendments to the 1980 Act, enacting the Low-Level Radioactive Waste Policy Amendments Act of 1985. 42 U.S.C. § 2021b-2021j ("1985 Amendments"). The 1985 Amendments set out a detailed schedule of deadlines ending on January 1, 1996, set forth periodic milestones for site development, and impose various penalties and surcharges for noncompliance. The penalty that has raised the most hackles is the "take title" provision: states that do not

comply "shall take title to the waste, shall be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred . . . as a consequence." 42 U.S.C. § 2021e(d) (2) (C).

New York has not joined a regional compact. Choosing instead to "go it alone," New York enacted legislation effective July 26, 1986: (1) promulgating standards for site selection; (2) creating a commission to select a site; and (3) authorizing the construction of a LLRW disposal site. *See* 1986 N.Y. Laws Ch. 673. As of 1989, New York, in full compliance with the 1985 federal amendments, has certified that it will be able to store, manage, or dispose of its LLRW after January 1, 1993. *See* N.Y. Pub. Auth. Law § 1854-c (McKinney Supp. 1991). To date, New York's commission has designated five potential storage sites in New York, three in Allegany County, two in Cortland County.

In February 1990, the State of New York, joined by the Counties of Allegany and Cortland, brought an action in the United States District Court for the Northern District of New York seeking to declare the 1985 Amendments unconstitutional. They claim that the 1985 Amendments violate the Tenth[1] and Eleventh[2] Amendments, as well as the due process clause of the Fifth Amendment[3] and the

[1]The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

[2]The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

[3]The due process clause of the Fifth Amendment provides that no person shall:

> be deprived of life, liberty, or property, without due process of law;

U.S. Const. amend. V.

guaranty clause of article IV of the United States Constitution.[4] The States of Washington, Nevada and South Carolina, intervening by right, Fed. R. Civ. P. 24(a), joined the federal defendants to uphold the 1985 Amendments. A legion of utility companies, medical groups, and the like also sought to intervene. Their motions were denied, although they were permitted to file a brief as *amici curiae* in support of the intervenors and the federal defendants.

All parties moved or cross-moved for summary judgment. Fed. R. Civ. P. 56(c). In addition, the intervenors joined in defendants' motion to dismiss the complaint. Fed. R. Civ. P. 12(b)(6). After oral argument, the district court read into the record a decision dismissing the complaint. *New York v. United States,* 757 F. Supp. 10 (N.D.N.Y. 1990).[5] The district court held that the 1985 Amendments

[4]The guarantee clause provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4.

[5]In its written opinion, the district court noted, "[a]t this juncture all parties have moved for summary judgment, and there appear to be no issues of material fact, and the case therefore appears ready for summary treatment by the Court." 757 F. Supp. at 11. The court, however, went on to grant the government's motion to dismiss the complaint. *Id.* at 13; *see* Fed. R. Civ. P. 12(b)(6). It is uncontested that the district court considered documentary evidence and affidavits. Accordingly, we treat the appeal as one from the grant of summary judgment. *Grand Union Co. v. Cord Meyer Dev. Corp.,* 735 F.2d 714, 717 (2d Cir. 1984). In reviewing *de novo* and considering the record in the light most favorable to appellants, we nonetheless fully agree with the court below that there exists no genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986); *Delaware & Hudson Ry. v. Consolidated Rail Corp.,* 902 F.2d 174, 177-78 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 2041 (1991). That said, we review whether the law was correctly applied. *National Union Fire Ins. Co. v. Turtur,* 892 F.2d 199, 203 (2d Cir. 1989); *City of Yonkers v. Otis Elevator* Co., 844 F.2d 42, 45 (2d Cir. 1988) (citing 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2716, at 654 (2d ed. 1983)).

did not violate the Tenth and Eleventh Amendments, and similarly dismissed plaintiffs' claims under the guaranty clause (and, implicitly, the due process clause), finding such claims "inextricably intertwined with the position just made in this decision, and those claims are accordingly dismissed." *Id.* at 13.

Plaintiffs appeal, reiterating the claim that the 1985 Amendments trench upon state sovereign immunity, but they do not press a due process claim on appeal. *See generally South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) (states are not "persons" within the meaning of the due process clause and, thus, are not protected by it); *Alabama v. EPA*, 871 F.2d 1548, 1554 (11th Cir.) (state which has toxic waste disposal site has no Fifth Amendment due process right and, therefore, cannot allege defective notice by the EPA), *cert. denied*, 110 S. Ct. 538 (1989).

DISCUSSION

More than a decade ago, the Supreme Court declared that "[n]uclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978). Thus, appellants undertake an unusually burdensome task to persuade us that federal disposal site control legislation impinges impermissibly upon state sovereignty. Indeed, one circuit court has already said, "that the [Atomic Energy] Act violates the Tenth Amendment has little basis for support. Congress, through its power to regulate interstate commerce and provide for the national defense and general welfare, clearly can enact legislation governing the use of nuclear energy." *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131, 135 (8th Cir. 1981). We are called upon

to review the 1985 Amendments to that same Atomic Energy Act; the amendments are designed to ensure state compliance with a plan for safe LLRW disposal.

The 1985 Amendments declare that, in addition to certain classes of nuclear waste generated by the federal government,

> Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of—
>
> (A) low-level radioactive waste generated within the State (other than by the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983.

42 U.S.C. § 2021c(a)(1). If a state fails to properly dispose of LLRW, certain penalties ensue:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. § 2021c(d)(2)(C).

It is this penalty provision that triggers the most vigorous constitutional challenges.

Appellants' first contention is that the 1985 Amendments violate the Tenth Amendment. Tenth Amendment analysis must now begin with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), where the Supreme Court instructed us that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 552 (overturning *National League of Cities v. Usery*, 426 U.S. 833 (1979)). In the intervening years, the Supreme Court has emphasized that the judicial role in evaluating Tenth Amendment challenges is narrowly cabined. *See South Carolina v. Baker*, 485 U.S. 505, 512 (1988) ("*Garcia* holds that the limits are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."); *see also* Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 72 (1989) ("In *Garcia*, five justices joined in a majority opinion that, in effect, concluded that if states desire to preserve any aspect of their sovereignty within the federal system they must look to Congress, and not to the courts."); *The Supreme Court, 1987 Term—Leading Cases*, 102 Harv. L. Rev. 143, 228 (1988) (*Baker* "unequivocally repudiat[es] the suggestion that the tenth amendment requires any substantive or qualitative analysis of the national political process").

It is self-evident that virtually every congressional exercise of power under the commerce clause will limit state power over that commerce and, to that extent, will invite state objections under the Tenth Amendment. As the *Garcia* Court observed:

> The fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Garcia, 469 U.S. at 554. (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)). Other circuits, including ours, have employed the *Garcia* analysis. *See, e.g., Nevada v. Watkins*, 914 F.2d 1545, 1556 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991); *EEOC v. Vermont*, 904 F.2d 794, 802 (2d Cir. 1990) (noting that the "*Garcia-Baker* standard is a very high one"). Quite simply, "[w]ith rare exceptions, . . . the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Garcia*, 469 U.S. at 550.

Perusing the legislative history of the 1985 Amendments, the conclusion is inescapable that, rather than discovering defects in the political process, both the 1980 Act and its 1985 Amendments are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics. *See* Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harv. Envtl. L. Rev. 437, 474 (1987) [hereinafter *Waste Wars*] ("Th[e] extensive state involvement [in the 1980 federal act and 1985 federal amendments] produced substantial benefits for all the states, strongly suggesting that state sovereignty received adequate protection."). With both statutes, the Congress acted only after robust debate and a clearly articulated acceptance of NGA and other state-based recom-

mendations. New York's senior Senator, urging adoption of the final version of the proposed amendments, proclaimed:

> New Yorkers will continue to light some of their lights with nuclear electricity—and their doctors will continue to use life-saving laboratory tests that depend on the use of radioactive materials. So will the citizens of South Carolina—and they will be able to watch New York, and the rest of the Nation, make their own arrangements to dispose of their own low-level radioactive wastes.

131 Cong. Rec. S38,423 (daily ed. Dec. 19, 1985) (statement of Senator Moynihan).

Turning specifically to the penalty provision that New York finds so offensive, we reject appellants' allegation that the "take title" provision, which they classify as a last-minute amendment to the House bill added to placate Senate demands, is the product of a grievous defect in the political process. They complain that this provision was not subject to timely scrutiny and committee debate. There is an irony in this grumbling when it is recalled that the Senate Environment and Public Works Committee was the author of the take title provision; it numbers among its members Senator Moynihan of New York. *See also Waste Wars,* 11 Harv. Envtl. L. Rev. at 458 ("The House nonetheless accepted the taking title provision by unanimous vote."). In any event, appellants misperceive the issue. "The political process ensures that laws that unduly burden the States will not be promulgated." *Garcia,* 469 U.S. at 556. *See Watkins,* 914 F.2d at 1556-57 ("[T]he tenth amendment does not protect a State from being outvoted in Congress. . . . Nor can Nevada complain that its lack of representation on the Conference Committee created a defect in the political process."); *EEOC v. Vermont,* 904 F.2d at 802 ("In any event, the absence of a given legislator or legislators, so long as the legislative body's appropriate procedural rules have been followed, does not mean that the national process leading to the enactment of a given piece of legislation was flawed.").

Appellants raise an alternative objection to the take title provision. Noting that *Garcia* cited *Coyle v. Smith,* 221 U.S. 559 (1911), appellants argue that, even after *Garcia,* the Tenth Amendment imposes *some* substantive limitations upon federal power; and they conclude that the take title provision falls within that forbidden zone. We are not persuaded.

In *Coyle,* the Congress sought to condition Oklahoma's admission into the Union upon Oklahoma's agreement to locate, at least initially, its capital in Guthrie and accept certain limitations upon the State's power to change its seat of government. The Supreme Court found such conditions to be a palpable violation of the Tenth Amendment. *See Coyle,* 221 U.S. at 565 (that a state's power to locate its own seat of government "could now be shorn. . . by an act of Congress would not be for a moment entertained").

In testing the waters surrounding *Garcia*'s laconic reference to *Coyle,* the district court perceptively noted that the Supreme Court's central concern in *Coyle* was "equality in dignity and power" among the several states, 221 U.S. at 568, a concern clearly not at issue here where the motivating engine of both the 1980 Act and 1985 Amendments is identical treatment for all states.

It should also be noted that formal transfer of title to nuclear waste, although usually effected by contract, is not uncommon. *See General Elec. Uranium Management Corp. v. United States Dep't of Energy,* 764 F.2d 896, 898 (D.C. Cir. 1985) (Secretary authorized to contract with persons who generate or hold title to nuclear waste, for the transfer of title to the Department of Energy); *Commonwealth Edison Co. v. Allied-General Nuclear Servs.,* 731 F. Supp. 850, 856 (N.D. Ill. 1990) (contingency clause in contract

between private nuclear generator and private nuclear reprocessing plant requiring the latter, upon noncompliance, to accept title to nuclear waste).

In sum, we are satisfied that the take title provision does not undermine the constitutional structure. Neither does it violate principles of federalism as recently explained in *Garcia*; and "[w]here, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." *Baker,* 485 U.S. at 513 (emphasis in original); *see generally International Assoc. of Firefighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814, 821 (10th Cir. 1989) (absent agreement between state agency and employees, the Fair Labor Standards Act does not violate the Tenth Amendment by compelling state to compensate employees with overtime pay rather then compensatory time); *Metropolitan Transp. Auth. v. ICC,* 792 F.2d 287, 298 (2d Cir.) (Rail Passenger Service Act, requiring the MTA to "permit the operation of Amtrack trains over its lines" does not violate the Tenth Amendment under *Garcia* or conscript the state to act in a way that unconstitutionally promotes a federal policy), *cert. denied,* 479 U.S. 1017 (1986).

Appellants, most notably Allegany County, strive to offer alternative grounds for declaring the 1985 Amendments unconstitutional. We are satisfied, however, that the 1985 Amendments do not violate the Eleventh Amendment. *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 14 (1989) (plurality opinion reasoning "that Congress' authority to regulate commerce includes the authority directly to abrogate States' immunity from suit"); *see id.* at 57 (White, J., concurring) (agreeing "with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States"); *see also National Foods, Inc. v. Rubin,* No. 91-7084 slip op. 5039, 5043 (2d Cir. June 12, 1991) ("The Eleventh Amendment has been interpreted to render states absolutely immune

from suit in federal court unless they have consented to be sued in that forum or unless Congress has overridden that immunity by statute."); *Russell v. Dunston,* 896 F.2d 664, 667 (2d Cir.) (citing *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976)), *cert. denied,* 111 S. Ct. 50 (1990). Similarly, we agree with the district court that appellants' argument, anchored in the guarantee clause of article IV, that there is a deprivation of a republican form of government, is analytically indistinct from the arguments supporting sovereign immunity under the Tenth Amendment. *See Baker,* 485 U.S. at 511 n.5 ("We use 'the Tenth Amendment' to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution.").

CONCLUSION

We have considered appellants' remaining arguments, but find them without merit. We conclude, therefore, that the 1985 Amendments pass constitutional muster. Accordingly, we affirm.

Opinion of the United States District Court for the Northern District of New York, Dated December 7, 1990

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al,*

Plaintiff,

against

UNITED STATES OF AMERICA,

Defendant.

90-CV-162

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December 7, 1990

CON. G. CHOLAKIS, D.J.*

It is my intention at this time to read a decision into the record. I know that it may seem very unusual that a decision will be read into the record on a matter that is as

*The transcript of this opinion, delivered from the bench, has been edited for grammatical construction, organization of quotations, and augmentation of citations.

complex and involved as this case obviously is. I do not want any of the participants to think that their positions have not been given due weight. We have spent an extraordinary amount of time on this one case in the past two weeks. As a matter of fact, I dare say we have spent as much time on this single case as we have spent on any other three or four cases combined during the last three or four years.

I do think, however, that in fairness to all the participants that a decision be made as quickly as possible so those parties involved can make a determination as to their future course of action. And I do not feel that just letting this matter sit for any length of time will do justice to the parties or to the Act itself. I have listened to all of the arguments presented by all of the attorneys, and I think I have given you relatively free reign because I was waiting to see if anyone could say anything that would change the feeling that the Court had about this subject after reading all of the papers, and as you know, the papers were voluminous. As a matter of fact, if I could sell them by the pound, I think I'd be in very good shape.

The plaintiffs State of New York and the Counties of Allegheny and Cortland challenge the constitutionality of the Low Level Radioactive Waste Policy Act Amendments of 1985, 42 U.S. Code Sections 2021 *et seq*, on the grounds that the Act violates the Tenth and Eleventh Amendments as well as the Guaranty Clause and Due Process Clause of the United States Constitution.

Before the Court are numerous motions and cross-motions. At this juncture all parties have moved for summary judgment, and there appear to be no issues of material fact, and the case therefore appears ready for summary treatment by the Court.

The United States in its motions to dismiss and for summary judgment relies principally on the Supreme Court case of *Garcia v. San Antonio Metropolitan Transit Author-*

ity, 469 U.S. 528 (1985). This case calls into question the judiciary's ability and authority to consider challenges to Congressional power over the States. *Garcia* overturned *National League of Cities v. Usury,* 426 U.S. 833 (1976), in which the Supreme Court proclaimed that the Tenth Amendment limited Congressional power to legislate under the Commerce Clause. The Court concluded in *National League* that the Tenth Amendment sheltered "the states' freedom to structure integral operations in areas of traditional governmental functions". Accordingly, Congress could not displace the states' freedom by regulating "the states as states" and limiting the attributes of state sovereignty. *Id.* at 552-554

In *Garcia,* a sharply divided Court rejected *National League,* concluding:

> In short, the framers chose to rely on a federal system in which special restraints on federal power over the states inhered principally in the workings of national government itself rather than in the discrete limitations on the objects of federal authority. State sovereign interests, then are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Garcia, 469 U.S. at 552.

The Court in *Garcia* ruled that judicial review of Congressional enactments founded on Commerce Clause powers should be limited primarily to an inquiry of whether the political process has failed. The Court did, however, indicate that some additional limits might exist on Congressional action based on "the constitutional structure". The *Garcia* court, however, did not define or identify these limits apart from citing without discussion the 1911 Supreme Court case of *Coyle v. Oklahoma,* 211 U.S. 559.

The citing of the *Coyle* case is significant. The *Coyle* case struck down a Congressional enactment which conditioned the statehood of Oklahoma on the placement of the state capital at a certain location. The Court acknowledged at page 565 of that opinion that "the power to locate its own seat of government was essentially and peculiarly [a] state power". The holding in *Coyle,* however, is clearly based on the finding that Oklahoma was being forced to do something which no other state was being forced to do; that being to locate her capital according to the wishes of Congress.

The *Coyle* Court stated in the last paragraph of its opinion on page 58 the following:

> The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears, we may remain a free people, but the Union will not be the Union of the Constitution.

Therefore, this Court reads *Garcia* as allowing judicial interdiction of federal powers over the states in the following areas: One, when that power is the result of a defect in the political process, and two, possibly when constitutional equality among the states has been jeopardized.

Garcia and the 1988 Supreme Court decision *South Carolina v. Baker,* 485 U.S. 505 (1988), foreclose, in this Court's view, judicial review of any Congressional action over the states which is validly enacted and equally applied to all states. Any review of the substantive merits of such an action apart from an inquiry into the "constitutional equality" of the action would require a judicially determined definition of the contours of state sovereignty. This Court is barred by *Garcia* from making such a definition.

The United States argues that there was no defect in the political process in the passage of the Act and that no other judicial challenge may be made pursuant to *Garcia*. Plaintiff Cortland County argues that several political process defects exist which should invalidate the law.

First, Cortland County argues that a lack of political accountability of Congress as regards this Act is a signal that the political process has failed. Cortland's argument is that Congress has passed a law which puts burdens on the states to pass certain unpopular laws. The political "heat" as well as the fiscal burden are then absorbed by the states rather than by Congress, the truly responsible party. Cortland also presents a second political defect theory in which the Congress is portrayed as being controlled by political action committees who have neutralized states' interests and influence.

Taking Cortland's second argument first, it is clear that the pervasiveness of political action committees in Congress is not the type of systemic breakdown envisioned by the *Garcia* court. This argument is really nothing less than an indictment of how the political system works. According to *Garcia*, the proper remedy is not judicial intervention but the rejection by voters of those representatives who are beholden to the special interest groups. The "built-in restraints that our system provides" will presumably correct this perceived problem. Therefore, Cortland's position is, in this Court's view, without merit.

Cortland's argument concerning political accountability is similarly lacking in legal foundation. In the *South Carolina v Baker* case, the Supreme Court declined to define what was meant by "political defects" but did characterize the terms as referred to "extraordinary defects in the national political process". *Baker*, 485 U.S. at 515. The Court in its discussion cited to a footnote contained in the 1938 Supreme Court case of *United States v Carolene Products*, 304 U.S. 144, 152 n. 4.

The Court interprets this authority as meaning that the "political process tests" referred to problems which may have had an untoward effect on a particular law's enactment or its subsequent political review. If the law is validly enacted, it may not thereafter be judicially challenged on political process grounds unless the effect of the law restricts a state from continuing meaningful political participation, where a state is foreclosed from challenging the law politically. In other words, the political process rationale for judicial intervention only arises when the legislative/political avenue has been functionally closed.

Such is not the case here. Nothing in the Act restricts New York's, or any other state's, ability to operate in the political arena and to challenge the law. This is not, in this Court's view, the type of political breakdown or type of extraordinary situation the Supreme Court envisioned as requiring judicial intervention. Therefore, this Court rejects any challenge to the Act based on the so-called "political process defect" test.

New York State argues that *Garcia* left open another path of attack other than the political process test. The State, joined by the other plaintiffs, argues that the Court still has the power to rule that particular laws destroy state sovereignty.

As just explained, this Court does not see how such an argument may be sustained and be consistent with *Garcia*.

Plaintiffs do not allege that New York State is being treated inequitably with other States. The State's argument, reduced to its essence, would require this Court to dictate a sacred province of state autonomy, and this, in this Court's judgment, would violate the *Garcia* holding. In this Court's view, any claims under the Guaranty Clause are inextricably intertwined with the position just made in this decision, and those claims are accordingly dismissed.

The claims under the Eleventh Amendment are likewise dismissed pursuant to the Supreme Court holding in *Pennsylvania v Union Gas*, 491 U.S. 1 (1989).

This Court is aware that the *Garcia* case was decided by a divided court, that the make-up of the Court has since changed, and that the *Garcia* doctrines may not survive. In fact, it may well be this case which results in *Garcia* being overturned. While this Court has problems with the *Garcia* holding, it is nonetheless constrained by the precedents which it reads as residing therein.

The defendant United States' motion to dismiss the complaint is therefore granted in all respects. I believe I have an appropriate order which will be signed and in all probability will be filed today. Thank you ladies and gentlemen.

Judgment of the United States District Court for the Northern District of New York, dated December 26, 1990.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY, NEW YORK; and THE COUNTY OF CORTLAND, NEW YORK

vs.

THE UNITED STATES OF AMERICA; WATKINS, JAMES D., as Secretary of Energy; CARR, KENNETH M., as Chairman of the U.S. Nuclear Regulatory Commission; THE U.S. NUCLEAR REGULATORY COMMISSION; SKINNER, SAMUEL K., as Secretary of Transportation; and THORNBURGH, RICHARD, as U.S. Attorney General, *et al.*

Case Number: 90-CV-162.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendants' Motion to Dismiss is Granted and all claims against Defendants are dismissed with prejudice.

Dated: December 26, 1990

GEORGE A. RAY
Clerk

MARY ANN FRANCISCO
(By) Deputy Clerk